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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 866

GEORGE K. WYMAN, individually and as Commissioner of the State of New York, Department of Social Services and JOHN LASCARIS, individually and as Commissioner of the Onondaga County Department of Social Services,

Appellants,

against

OSSIE BOWENS, LURETHA GADDIS, WILLA JEAN MANNING, ANNIE BELL MCALLISTER and RUTH MICKLE, individually and on behalf of all other persons similarly situated,

Appellees.

JURISDICTIONAL STATEMENT

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Appellees.

JURISDICTIONAL STATEMENT

Appellant George K. Wyman, Commissioner of the New York State Department of Social Services, appeals from a judgment and order of the United States District Courts for the Southern and Northern Districts of New York, entered on October 14, 1969 in two consolidated cases disposed of in the same decision, enjoining any further application of Section 139-a of the New York Social Services Law on the grounds that the statute is unconstitutional and ordering that retroactive benefits be given to each member of the class which appellees seek to represent, dating back to the time of first application.

Appellant does not appeal from that portion of the decision below which held that Section 121 of the New York Social Services Law is in all respects constitutional.

Opinion Below

The opinion of the Northern and Southern District Courts is not yet reported and is reproduced herein as Appendix A. The order of these District Courts is reproduced herein as Appendix B.

Jurisdiction

The judgment and order of the United States District Courts for the Northern and Southern Districts was entered on October 14, 1969. Appellant's Notice of Appeal was filed on October 30, 1969. The jurisdiction of this Court to review the instant case is conferred by 28 U.S.C. Section 1253.

Statute Involved

Social Services Law, Section 139-a:

> "*Special provisions to avoid abuse of assistance and care.*
>
> 1. Any person who shall apply for home relief or aid to dependent children within one year after arrival in this state, shall be presumed to have come into the state for the purpose of receiving public assistance or care and the social services official where application is made, shall deny public assistance and care to such applicant unless such applicant shall establish by clear and convincing proof that the purpose of his or her entry was not for the purpose of securing public assistance and care in this state. In addition to com-

plying with the foregoing provisions, the applicant shall also submit with his or her application a certificate from the appropriate local employment office of the State Department of Labor issued within a two week period from the date of his or her application stating that such employment office has no order for an opening in part-time, full-time, temporary or permanent work of any kind to which the applicant could properly be referred by such office, taking into consideration only his or her physical and mental capacity without reference to his or her customary occupation or acquired skill.

2. The social services official shall in every case complete his investigation and make his determination of the application under this section not more than thirty days after receipt of the application."

Questions Presented

1. Does this Court's ruling in *Shapiro* v. *Thompson*, 394 U. S. 618 (1969), unequivocally bar New York State from denying welfare benefits to otherwise eligible public assistance applicants whose sole motive in coming to the State was to receive such benefits?

2. Did the Court below err in ordering that retroactive benefits be paid to the entire class of public assistance recipients which appellees seek to represent, up to the time of first application for each individual, in view of this Court's rulings establishing that state statutes are presumed to be constitutional until judicially declared to be invalid?

3. Does the case of *Gaddis* v. *Wyman*, present a case or controversy warranting the granting of equitable relief?

Statement of the Case

Appellee Ossie Bowens, proceeding by order to show cause, instituted in the United States District Court for the Northern District of New York an action denominated as a class action, for a temporary restraining order and a preliminary and permanent injunction to enjoin the enforcement of § 139-a of the New York State Social Services Law, which mandates denial of welfare to public assistance applicants who have come to the State for the sole motive of receiving welfare benefits. Plaintiff also sought the convening of a statutory three-judge court to hear the application. The order to show cause was dated July 25, 1969.

By order dated August 11, 1969 the Hon. Edmund Port of the United States District Court for the Northern District of New York ordered that a three-judge District Court be convened to consider appellee's claim that § 139-a contravened her right to equal protection of the laws and her right to travel. The statutory three-judge court which was appointed consisted of Circuit Judge Sterry Waterman, Judge Port and Southern District Judge Walter Mansfield sitting by designation in the Northern District.

On July 3, 1969, appellee Luretha Gaddis commenced a class action in the United States District Court for the Southern District of New York attacking the constitutionality of § 139-a of the New York Social Services Law. She also attacked § 121 of the New York Social Services Law, which permits the Department of Social Services to furnish transportation to another state or county to any person receiving public assistance who has friends or relatives willing to undertake his support. She sought injunctive relief, a declaratory judgment, and the convening of a three-judge court to grant this relief.

Appellee Gaddis' attorney was informed on July 7, 1969, that appellee would be restored to public assistance; this

change was necessitated by the fact that the original decision to deny welfare benefits to appellee Gaddis was the result of a misinterpretation of the statute, which it was the duty of the Westchester County Commissioner of Social Services to correct. As a result of this change in circumstances, appellant Commissioner Wyman on July 15, 1969 moved to dismiss her complaint on the grounds that the case was moot. Conceding that appellee Gaddis' interest in the litigation had been "substantially affected" by the Westchester Social Services Department decision to restore her to assistance, appellee's attorney moved on July 18, 1969 for intervention on behalf of three additional applicants for assistance and continued to seek the relief originally sought by appellee Gaddis.

The motion to dismiss (as well as plaintiffs' motions) were heard before the Hon. Walter R. Mansfield, who ruled that when the action was commenced appellee Gaddis was a proper representative of the purported class and that despite the fact that the intervention was sought only after Mrs. Gaddis was given public assistance, the action was not moot. Judge Mansfield granted the intervention and ruled that the intervenors could properly represent the class on whose behalf appellee Gaddis had brought the action. Defendant Wyman's motion to dismiss was denied. Judge Mansfield also held that a substantial constitutional question was presented "as to whether New York can even deny assistance to persons who clearly enter the State solely to take advantage of its public assistance programs." By order dated August 5, 1969, Judge Mansfield convened a three-judge court. The members of this Court were Circuit Judge Sterry Waterman, Judge Mansfield and Northern District Judge Edmund Port sitting by designation in the Southern District.

In an order dated August 11, 1969, the cases of *Bowens* v. *Wyman, et al.* and *Gaddis* v. *Wyman, et al.*, were consolidated, since they had been assigned to the same three-judge panel. Appellant Wyman answered the complaint of

appellee Bowens on August 27, 1969 and answered the complaint of appellee Gaddis on August 28, 1969.

The statutory three-judge court filed its opinion on September 22, 1969 finding that Section 139-a is unconstitutional upon its face. Although New York has consistently rejected residence laws in the field of public assistance as repugnant to New York State policy, the Court below came to the conclusion that the legislative history of Section 139-a showed that its purpose was to discourage indigents from migrating into New York. It was held that this Court's decision in *Shapiro* v. *Thompson*, precluded New York from considering motive in coming into the State in its allocation of public assistance resources and its administration of New York's work incentive program. The Court did not reach the question of whether Section 139-a violates the Social Security Act (42 U.S.C. Section 601 *et seq.*) and the regulations promulgated thereunder, as alleged by appellees. As to Section 121 of the New York Social Services Law, the Court granted appellant's motion to dismiss the complaint insofar as it was based upon the alleged invalidity of the section.

The District Court refused on October 24, 1969, to grant a stay of the order and Justice John M. Harlan also declined on November 5, 1969, to stay the judgment below pending this appeal. In requesting such a stay the appellant had pointed out that the retroactive class order granted by the Court below made the unwarranted assumption that Section 139-a was void *ab initio*.

ARGUMENT

The instant appeal presents several substantial questions of law requiring plenary consideration by this Court.

1. The Court below was in error in interpreting this Court's decision in *Shapiro* v. *Thompson*, 394 U. S. 618 (1969) as precluding New York from considering motive in coming to the State in its allocation of public assistance resources and in its administration of its work incentive program.

A. The decision below held that this Court's ruling in *Shapiro* v. *Thompson*, 394 U. S. 618 (1969), unequivocally bars New York State from denying welfare benefits to otherwise eligible public assistance applicants whose *sole* motive in coming to the State was to receive such benefits. The District Court rejected appellant's argument that the State had a legally recognizable and valid interest in encouraging self-support, and in establishing a policy which would require a parent who is not medically disabled to rely upon employment rather than public assistance to provide the family income. The decision is tantamount to the establishment of a constitutional right to public assistance, which must be paid to a constantly increasing class of persons regardless of their motive for coming to New York. Thus, the Court's erroneous reading of *Shapiro* negates the priority given by the State to its work incentive program, and creates a fiscal problem, the future dimensions of which are impossible to calculate.

The crux of the decision below is the completely unsupported conclusion that "deterrence of in-migration was the purpose behind Section 139-a [as] disclosed by its legislative history."* Relying upon this conclusion, the Court

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* Appendix A, p. 31.

found that Section 139-a "is legally indistinguishable from the statutes . . . invalidated [in *Shapiro* v. *Thompson* . . .]."*

The legislative history of all three statutes before this Court in *Shapiro* show that the statutory intent was to use residence criteria to exclude the poor. (394 U. S. at 628.) By contrast, New York State has never had a residence statute. Indeed, a proposed residence law was vetoed by Governor Rockefeller on the grounds that it was repugnant to state policy, Legis. annual, pp. 672-673 (1960):

> "To make length of residency the controlling issue is not part of our State's heritage with its respect for the dignity and worth of each individual."

Similarly, a directive from the New York Deputy Commissioner for Welfare Administration, Clifford P. Tallcott, advised all Commissioners of Social Services within the State that durational residency requirements have traditionally been regarded as repugnant to New York policy, and that § 139-a of the Social Services Law may not be interpreted as denying benefits because of the applicant's length of residence. Bulletin 91-b, p. 10, Sec. C, *Special Provisions to Avoid Abuse of Assistance and Care*, August 1, 1969.*

The only actual legislative history cited as a supposed contradiction to New York's traditional policy of welcoming new comers, indigent or otherwise, relates to legislative concern over the dramatic increase in public assistance

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* Appendix A, p. 32.

** It is interesting to note that a news release from the United States Department of Health, Education and Welfare dated June 3, 1969, commenting upon this Court's decision in *Shapiro* v. *Thompson*, 394 U. S. 618 (1969), lists New York among nine other states and jurisdictions which have had *no* durational residency requirements for federal-state public assistance programs.

applications year by year. Such concern and any subsequent determination as to the proper allocation of the State's welfare resources, is of course in no way equivalent to an intention to exclude indigents. Far from being "legally indistinguishable" from the statutes reviewed by this Court in the residence cases, analysis will show that New York's provisions are based upon entirely different considerations.

The Connecticut statute* considered by the Court in *Shapiro,* mandated denial of assistance to anyone coming into the state "without visible means of support for the immediate future." Thus, the applicant must arrive either with a *bona fide* job offer or a cash stake. As indicated in Circuit Judge Smith's opinion below on behalf of the three-judge District Court (*Thompson* v. *Shapiro,* 270 F. Supp. 331, 333, D. Conn. 1967), support from relatives or friends or from a public, private or voluntary agency would not satisfy the requirements of the law. While Judge Smith noted that he *would* have disapproved a classification denying aid "to those whose sole and principle purpose in entering is to seek aid", he made clear that the Connecticut statute was *not* based on motivation:

> "[T]he classification made here, based not on purpose in coming but solely on indigency, hits most heavily those with not even an arguably bad purpose in coming and may not be upheld." 270 F. Supp. at 337.

Thus, it is evident that the New York statute is substantially different from Connecticut's. Under § 139-a, an otherwise eligible applicant must receive assistance unless his sole motivation was to obtain such benefits. If he came for any other reason, or for example, had grounds to believe that relatives or private agencies would assist

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* Chapter 299, § 17-2d of the Connecticut General Statutes.

him financially, he would not come within the statute's ambit.

The District of Columbia and Pennsylvania statutes* which the United States Supreme Court considered in *Shapiro*, along with Connecticut's, were based solely upon a one year residence requirement and, therefore, were held to contravene the right to travel.

However, § 139-a does not regulate travel into New York** nor is deterrence of such travel its purpose. Unlike the residence cases where there was an actual, unqualified denial of welfare to all otherwise eligible applicants solely because they had recently moved into the jurisdiction, in New York ineligibility is merely *potential* and determined on a case-by-case basis. It is determined by a procedure which satisfies the requirements of due process and which results from a finding that the applicant's *sole* motive in coming to New York was to obtain welfare.

The majority opinion in *Shapiro* emphasized the fact that the residence statutes "enact what in effect are non-rebuttable presumptions that every applicant for assistance in his first year of residence came to the jurisdiction solely to obtain higher benefits. Nothing whatever in any of these records supplies any basis in fact for such a presumption." 394 U. S. at 631 (emphasis supplied). It was also found that none of the statutes was "tailored" to serve the objective of making an individual judgment as to the facts concerning each applicant. However § 139-a seeks to carry out precisely that purpose.

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* D. C. Code Ann. § 3-203 (1967); Pa. Stat., Tit. 62, § 432(6) (1968).

** Indeed, the brief of appellee Gaddis and the intervenor plaintiffs before the Court below conceded (p. 30) that applicants "do not make advance inquiries about welfare residency rules" and that "most persons entering New York do not know that Section 139-a exists."

New York's presumption requiring the applicant to give clear proof of his motive in coming to the State, merely means that he must go forward in presenting his evidence; he may not refuse to reveal or explain his motive, since such a refusal would result in a denial of assistance. These facts are, of course, peculiarly within his own knowledge. It has long been axiomatic that the function of a presumption of law is to place upon the opposing party the burden of producing evidence upon the matter in question; upon the production of such opposing evidence, the presumption disappears from the case. 5 A.L.R. 3rd 19, 39 (1965) and cases cited. See in accord 9 Wigmore on Evidence § 2491 (3rd edition); *Commissioner* v. *Smith*, 324 U. S. 164, 170-171 (1944); *Chicago Stock Yards Company* v. *Commissioner of Internal Revenue*, 129 F. 2d 937, 948 (1st Cir. 1942).

The one year period referred to in the statute merely provides a convenient cut-off point beyond which applicants would no longer be scrutinized as to motives. The State could have omitted mention of the one year period entirely, since the object of the statute is to focus upon the applicant's motive in coming to the State.

The decision below* finds that it is "questionable whether the statutory presumption as to motive is factually supportable or bears any rational relationship to established facts." There can be no doubt that there has been an enormous increase in the number of applicants for public assistance. See Committee on Ways and Means, U. S. House of Representatives, Report of Findings of Special Review of Aid to Families with Dependent Children in New York City, pp. 18, 21 (Sept. 24, 1969):

> "In 1968, as in previous years, about 4 percent of all AFDC mothers had moved to the City within the previous 2 years. However, these are indications that

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* Appendix A, pp. 30-31.

over the years AFDC mothers and perhaps other poor persons as well tend to migrate to those places where AFDC payments are higher."

* * *

"Why are so few poor persons receiving AFDC in Memphis, Tenn., and Raleigh, N. C.? The answers given would be the same as that given to explain the large number of recipients in New York City but *diametrically opposite*—little or no CAP funds, a high sense of powerlessness and a deep feeling of apathy among recipients, restrictive attitudes of caseworkers toward their clients, few recipients belonging to welfare rights organizations, small grants (so small in fact they are much less than the low wages AFDC women can get in the market place), restrictive eligibility policies, and the like."

Thus, the study indicates that New York's rapidly growing public assistance rolls appear to have resulted in part from New York's conscientious efforts to give recipients their full rights and to provide grants which more closely approximate the actual cost of living for such recipients, as well as from the concern and respect for these recipients demonstrated by caseworkers.

Moreover, there is a "rational relationship" between a request for welfare made shortly after arrival in this State and motive for arrival. At the very least, such an application is sufficient basis for requiring the welfare recipient to supply information concerning his motive,

In addition, this Court held in *Shapiro* that a State may not "fence out" a mother who is seeking to make a new life for herself and her children" and "considers, *among other factors,* the level of a State's public assistance." 394 U. S. at 632 (emphasis supplied.) By contrast § 139-a distinguishes between this mother and the one who equates a better life *solely* with better welfare payments. Nothing

in *Shapiro* holds that a State is prohibited from denying aid in the latter situation.

Significantly, Mr. Justice Harlan's dissent cites § 139-a and notes that even the appellees in the residence cases acknowledged that "welfare payments could be denied those who came primarily to collect welfare by means of less restrictive provisions" than the durational residence requirements (394 U. S. at 675). Nevertheless, the three-judge Court in the instant cases in our opinion mistakenly read the majority decision in *Shapiro* as rendering any such denial by statute *per se* unconstitutional.

B. The decision below concludes that "[n]o legally recognizable State interest has been offered as justifying denial of public assistance to an applicant on the ground that she entered the State solely for the purpose of obtaining it. The argument that such a standard furthers the State's policy of encouraging self-support and self-employment must be rejected."* However, a careful reading of this Court's decision in *Shapiro* indicates that such incentives, while not constituting a compelling interest of the State, are permissible State objectives (394 U. S. at 634). Certainly, they must be *valid* interests, in view of the similar concerns in the Social Security Act as reflected in 42 U.S.C. §§ 301, 601, 1201 and 1351.

It is respectfully submitted that the State need not show a compelling interest in the promulgation of the statute at issue. As shown in Point A, *infra*, there has been no incursion—legally or factually—on the rights of plaintiffs or the class they seek to represent to travel to New York. Thus, the applicable standard is a showing that the State's purpose is reasonable and that the statute is a valid means of implementing this purpose. *Lindsley* v. *Natural Carbonic Gas Company*, 220 U. S. 61 (1911); *McGowan* v. *Maryland*, 366 U. S. 424, 425 (1961).

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* Appendix A, pp. 33-34.

New York's policy of preferring that the source of income for a family be a working parent rather than welfare payments, is beneficial for all concerned. As set out in Section 350-b of the Social Services Law:

> "It is hereby declared to be the policy of the state that there be a working incentive program under which individuals receiving aid to dependent children will be furnished incentives, opportunities, and necessary services so that: certain of such individuals will be employed in the regular economy and others will be able to participate in special work projects, in order to restore the families of such individuals to independence and useful roles in their communities and that such individuals will be able to acquire a sense of dignity, self-worth and confidence flowing from their recognition as wage earning members of society and so that the example of a working adult in such families will have beneficial effects on the children in such families."

§ 139-a is one of several methods used to implement the State's policy. This purpose is not only reasonably related to a legitimate governmental objective and therefore valid under the standards established by this Court, *Lindsley* v. *Natural Carbonic Gas Company, supra; McGowan* v. *Maryland, supra; Two Guys From Harrison-Allentown Inc.* v. *McGinley*, 366 U. S. 582, 591-592 (1961); *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U. S. 522, 528 (1959); *Railway Express Agency, Inc.* v. *New York*, 336 U. S. 106, 110 (1949) but is also a necessary purpose; *McLaughlin* v. *Florida*, 379 U. S. 184, 191, 196 (1964); *Katzenbach* v. *Morgan*, 384 U. S. 641, 657 (1966); 82 Harv. L. Rev. 1065, 1076-1132 (1968); 116 Pa. L. Rev. 924, 930 (1963).

The Court below makes the comment that "no rational relationship exists between an applicant's motive in enter-

ing the State and her ability to obtain employment and support herself and her children." However, § 139-a concerns motive in coming to the State as related to an application for public assistance filed shortly thereafter. Obviously *bona fide* efforts to obtain employment would rebut any inference that the sole motive was to obtain welfare benefits. The State does not isolate itself from the problems of indigent newcomers, but on the contrary, stands ready to extend the assistance not only of the Department of Social Services but also of the New York State Employment Office to those seeking work. It must also be emphasized that § 139-a does not apply to applications under § 300 *et seq.* of the New York Social Services Law, which involves the medically incapacitated.

Without the work incentive requirement, a new arrival in the State who has no intention of seeking employment may remain dependent for a lifetime and involve future generations of the family in the same cycle. Dwellings for such families have proved difficult to find, and living quarters in rooming houses or hotels are often inadequate to meet the housing needs of those on the welfare rolls. § 139-a attempts to reduce these interdependent problems.

The statute does not discourage indigent persons from coming into New York to seek a better life. Indeed, it encourages social, economic and psychological self-improvement by its effective requirement of good faith efforts to achieve that improvement.

Nor does the New York State Legislature's consideration of financial factors constitute an improper basis for legislation measured under the equal protection clause. This Court in *Shapiro* rejected budgetary factors only in the context of a deprivation of plaintiff's right to travel and of equal protection of the laws; however, the State's valid interest in preserving fiscal integrity in its programs was explicitly recognized (394 U. S. at 618).

While the New York welfare laws evidence a strong state policy to furnish necessary aid, the Legislature could not be indifferent to and was entitled to take into account the rapid increase taking place in the number of persons who receive some form of welfare in New York;* the fact that aid to dependent children is the largest segment of the total welfare budget;** the fact that the persons coming into the State who are potential welfare applicants will not expand the tax base which is the source of most of the welfare budget; the fact that New York's welfare payments exceed the average for the country;*** and the likelihood that persons from other states may be attracted to New York in order to obtain these more liberal payments. While Judge Smith in *Thompson* v. *Shapiro, supra*, found evidence that most of the class involved did not come to Connecticut in order to receive public assistance (270 F. Supp. at 337), the study by the Committee on Ways and Means of the U. S. House of Representatives cited, *supra*, in Point (A) indicates that the evidence is to the contrary as to New York. Obviously, the failure of the Legislature to consider these factors would constitute an abandonment of its function. In this process, New York does not separate itself from other states sharing the same problem, but simply establishes standards and safeguards to maintain its own system in order to provide the greatest possible benefits to those it assists.

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* In the area of aid to dependent children, between December, 1965 and October, 1968, the increase in the number of recipients in New York City alone was from 391,000 to 709,000—a rise of 81%. Podell, "A.F.D.C. in New York City and Other Urban Areas" (The Center for the Study of Urban Problems, City University of New York, March, 1969, pp. 3-5).

** "The program of aid to families with dependent children is by far the largest in terms of both numbers aided and costs." "Report of the Joint Legislative Committee to Revise the Social Welfare Law of New York State, 1967-1968"; p. 37.

*** The New York Times, April 8, 1969, p. 38.

C. The Court below noted that it sympathized with New York's "substantial increase in the number of recipients of public assistance in recent years . . .",** However, the Court's order provides welfare benefits to the entire class of persons appellees seek to represent, up to the time of first application for each individual.

It is axiomatic that a State statute is presumed to be constitutional until judicially declared to be invalid. *Minnesota ex rel. Pearson* v. *Probate Court*, 309 U. S. 270 (1939); *Defiance Milk Products Company* v. *DuMond*, 309 N. Y. 537, 540-541 (1956); *Matter of Van Berkel* v. *Power*, 16 N. Y. 2d 37, 40 (1965), and cases cited therein. Yet the order makes the opposite presumption that Section 139-a was void *ab initio* and that therefore all applicants *ever* denied under these statutes must—as a constitutional right—receive retroactive payments.

The size of the class represented by appellees have not yet been determined, but it is undisputed that its members are numerous. Moreover, it is impossible even to estimate the composition of the class included in the order, or whether it would encompass those who are now living in another state but who claim benefits for the period, for example, of May through September. The order is tantamount to a money judgment against the State; such a judgment may require appropriation of funds by the Legislature. The retroactive payments requested by appellees are not "due and owing", since appellants were acting under legislation which was presumed constitutional.

It is true that the State has waived the sovereign immunity granted to it by the Eleventh Amendment of the United States Constitution; however, as with the Federal Government, *United States* v. *King*, 395 U. S. 1, 4 (1969), this waiver was effectuated through the Court of Claims Act and is governed by its terms. See Section 8,

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** Appendix A, p. 34.

et seq., of the Court of Claims Act, New York State Judiciary Act, Volume 29-A, Part II (McKinney's Consol. Laws). Appellees have not complied with the Act's requirements.

In summary, the court below, in addition to its erroneous conclusion on the merits of this action, has also established an unwarranted and dangerous precedent as to the presumption of constitutionality of State statutes. Such an incursion on the Eleventh Amendment would allow money judgments against the State to be tabulated back to the inception of a statute—no matter how many years the statute has been in existence—at any time a federal court invalidates state legislation. It is respectfully submitted that such a rule must be struck down as impermissible and in conflict with this Court's express holdings. *Minnesota ex rel. Pearson* v. *Probate Court*, *supra*.

2. The granting of injunctive relief by the District Court in *Gaddis* v. *Wyman* was inappropriate, since there was no case or controversy between the only plaintiff and defendants at the time intervention of all other proposed plaintiffs was permitted.

Although appellee Luretha Gaddis was not receiving public assistance at the time she instituted her action in the Southern District of New York, she was restored to assistance a few days thereafter on July 7, 1969. This change was necessitated by the fact that the original decision to deny welfare benefits to her was a result of a misinterpretation of Section 139-a, which it was the duty of the Westchester County Commissioner of Social Services to correct. As a result of this change in circumstances, appellant Commissioner Wyman moved on July 15, 1969 to dismiss her complaint on the grounds that the case was moot. Conceding that appellee's interest in the litigation had been "substantially affected" by the Westchester Social Services Department decision to restore her to assistance, appellee's attorney moved on July 18, 1969 for interven-

tion on behalf of three additional applicants for welfare and continued to seek the relief originally sought by appellee Gaddis.

Judge Mansfield, in a ruling later affirmed by the three-judge court in the decision below, erroneously permitted this intervention despite the fact that there was no remaining controversy concerning the statutes at issue between the only plaintiff and defendants.* The Court below failed to analyze the real issue in discussing the mootness question with relation to the Southern District action:

> "Upon argument counsel for plaintiffs in the Gaddis suit further informed the Court of the existence of other applicants denied on the basis of Section 139-a who are presumably ready to step into the shoes of any named plaintiffs forced to withdraw. Dismissal for mootness would therefore not be warranted."**

The question is not whether the intervenors had a controversy with defendants. It is obvious that some of them did, and that—without the slightest hardship—they could have filed a complaint attacking the constitutionality of Section 139-a and asking relief on behalf of the class. However, they are improperly present in this case as *intervenors* in a moot case.

This Court has made clear that there is no federal jurisdiction to render a declaratory judgment as to the constitutionality of a statute when plaintiff no longer has a controversy that is immediate and real as to him. In *Golden*

---

* Appellee Gaddis' attorney attempted to claim that the action was not moot because she had received no retroactive payment for the month of June. However, no June assistance had been rendered to her because she had incurred no debts during that period. Public assistance must be related to need. Thus, any decision to deny retroactive assistance was not based upon Section 139-a, but upon other requirements as to eligibility. The remaining state law questions are to be decided at appellee's administrative "fair hearing."

** Appendix A, p. 29.

v. *Zwickler*, 394 U. S. 103 (1969), plaintiff had requested a declaratory judgment as to the constitutionality of anonymous handbills in connection with an election. Plaintiff's handbills concerned a candidate who was no longer running for office. A three-judge district court had held that this fact did not render the controversy moot, since the controversy was justiciable at the time the action was brought. *Zwickler* v. *Koota*, 290 F. Supp. 254 (E.D.N.Y. 1968).

In reversing, this Court held:

> "The District Court erred in holding that Zwickler was entitled to declaratory relief if the elements essential to that relief existed '[w]hen this action was initiated.' The proper inquiry was whether a 'controversy' requisite to relief under the Declaratory Judgment Act existed at the time of the hearing on the remand. We now undertake that inquiry.
>
> '[T]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions.'"

Zwickler argued further that he had a right to adjudication, since the statute would be applied to others with similar interests. While *Zwickler* v. *Koota* was not a class action, this Court's rationale in answering this contention was pertinent:

> "It was not enough to say, as did the District Court, that nevertheless Zwickler has a 'further and far broader right to a general adjudication of unconstitutionality . . . [in] [h]is own interest as well as that of others who would with like anonymity practice free speech in a political environment . . .' The constitutional question, First Amendment or otherwise, must be presented in the context of a specified live grievance."

The United States Court of Appeals for the Second Circuit similarly held in *Rosado* v. *Wyman*, —— F. 2d —— (2d Cir. 1969) [July 16, 1969], appeal to this Court pending No. 540, in relation to the constitutionality of Section 131-a of the New York Social Services Law, that a change in the facts applicable to plaintiffs rendered the controversy moot.

In the case of *Clarence Jackson, et al.* v. *Department of Public Welfare of the State of Florida*, —— F. Supp. —— (Civil Action #68-568—Civ. E.C. [April 23, 1969]), the United States District Court for the Southern District of Florida dismissed a suit requesting a three-judge court to consider the constitutionality of certain Florida statutory provisions relating to the Aid to Permanently and Totally Disabled welfare program. Plaintiff had received a hearing under state law and had been reinstated in the welfare program. The Court pointed out:

> "The threshold question is 'whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' *Golden* v. *Zwickler*, 37 U.S.L. Week 4185, 4186 (U. S. March 4, 1969). The facts of this case, in their present posture, do not demonstrate a prospect of 'immediacy and reality' between the litigants that is sufficient to justify a determination of the constitutional issues by this court. Nor is plaintiff aided by the assertion that he represents the broader interests of others that are threatened by similar action. 'The constitutional question . . . must be presented in the context of a specific *live* grievance.' *Golden*, supra, 37 U.S.L. Week at 4187." (Emphasis supplied)

The rulings laid down in cases such as *Golden* and *Jackson* are not altered by the presence of proposed intervenors. If a case is moot because the one purported member of the class can no longer represent the class at all, no intervention can create such a class. The case of *Kelly* v. *Wyman*, 294 F. Supp. 887, 890 (S.D.N.Y. 1968) cited by the Court below is inapposite. There the Court found that "most plaintiffs" were to receive "emergency assistance." Here, however, the only plaintiff had no further controversy with the defendants.

Nor can it be argued that the intervention was properly permitted because no court had yet declared the controversy between plaintiff and defendants moot. The crucial question is whether this controversy in fact existed at a given time. *Cooper* v. *Power*, 282 F. Supp. 548 (E.D.N.Y. 1968); *Troy State University* v. *Dickey*, 402 F. 2d 515 (5th Cir. 1968) and cases cited; *cf. Golden* v. *Zwickler, supra; Singleton* v. *Board of Commissioners of State Institutions*, 356 F. 2d 771 (5th Cir. 1956).

The Northern District action, *Bowens* v. *Wyman*, is not affected by the mootness of the Southern District action. Thus, the constitutionality of Section 139-a is squarely before this Court. However, this Court should not sanction the erroneous principle that there can be intervention in a main action that is moot.

CONCLUSION

For the foregoing reasons it is respectfully requested that this Court note probable jurisdiction and grant plenary consideration to the instant appeal.

Dated: New York, New York, November 17, 1969.

Respectfully submitted,

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Attorney General of the
State of New York
Attorney for Appellant
Commissioner Wyman

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MARIA L. MARCUS
Assistant Attorney General
of Counsel

APPENDIX A

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

69 Civ. 2921

LURETHA GADDIS, individually, on behalf of her minor children, and on behalf of all other persons similarly situated,

Plaintiff,

and

WILLA JEAN MANNING, ANNIE BELL MCALLISTER and RUTH MICKLE,

Plaintiffs-Intervenors,

against

GEORGE K. WYMAN, individually and as Commissioner of the Department of Social Services for the State of New York, and LOUIS P. KURTIS, individually and as Commissioner of Westchester County Department of Social Services,

Defendants.

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF NEW YORK.

69 Civ. 258

OSSIE BOWENS, individually and on behalf of all other persons similarly situated.

Plaintiff,

against

GEORGE K. WYMAN, Commissioner of the New York State Department of Social Services, and JOHN LASCARIS, Commissioner of the Onondaga County Department of Social Services,

Defendants.

APPEARANCES:

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Attorney for Plaintiff and Plaintiffs-Intervenors in *Gaddis* case
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Attorney for Plaintiff Ossie Bowens
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Center on Social Welfare Policy and Law
Amicus Curiae
By Lee A. Albert, Esq.
401 West 117th Street
New York, N. Y. 10027
Lacy Katz, of Counsel

Before WATERMAN, Circuit Judge, and PORT* and MANSFIELD,** District Judges

MANSFIELD, D. J.:

Plaintiffs in the above two class actions are applicants for public assistance administered by the New York State Department of Social Services pursuant to the cooperative federal-state program for Aid to Families with Dependent Children ("AFDC" herein), Social Security Act, 42 U.S.C. §§ 601-10; N. Y. Social Services Law § 343. They have at various times been refused such aid by New York State and County Social Services officials, even though otherwise eligible, because of failure to comply with § 139-a of

* Of the Northern District of New York sitting by designation in the Southern District of New York.

** Of the Southern District of New York sitting by designation in the Northern District of New York.

New York's Social Services Law, which presumes that anyone applying for such assistance within one year after arrival in New York came into the state for the purpose of receiving such assistance and requires New York Social Services officials to deny such an application unless the applicant can establish "by clear and convincing proof that the purpose of his or her entry was not for the purpose of securing public assistance and care in this state." In at least one case (Willa Jean Manning) free transportation back to the plaintiff's state of origin has been offered by Social Services officials pursuant to § 421 of the Social Services Law, which authorizes the State Department of Social Services, where a recipient of public assistance has legally responsible relatives or friends willing to aid in supporting him in another state, to furnish transportation to such other state.

"The present class actions challenge the validity of § 139-a as violative of both the Equal Protection Clause of the Constitution and regulations promulgated by the Department of Health, Education and Welfare under the Social Security Act. The *Gaddis* complaint also attacks § 421 on the same grounds. Plaintiffs seek declaratory judgments and preliminary and permanent injunctions restraining enforcement of the laws under attack. Jurisdiction is invoked pursuant to various federal statutes, including 28 U.S.C. § 1343(3) and (4) (actions brought under 42 U.S.C. § 1983), §§ 2201 and 2202 (declaratory judgments) and § 2281 and § 2284 (3-judge district courts). Defendants have cross-moved, pursuant to Rule 12(b), F.R.C.P., for dismissal of the *Gaddis* complaint for failure to state a claim upon which relief may be granted.

Pursuant to Rules 23 and 24, F.R.C.P., three additional plaintiffs (Willa Jean Manning, Annie Bell McAllister and Ruth Mickle) were permitted to intervene as named plaintiffs in the *Gaddis* action after an issue was raised as to the standing of Luretha Gaddis to sue and represent the class in the action instituted by her. See district court

decision filed August 7, 1969. Since both lawsuits raise identical constitutional questions of substance, we were appointed a three-judge district court in each case pursuant to 28 U.S.C. § 2281, and, with a view to avoiding duplication of effort, the actions were consolidated for purposes of hearing and determination.

For the reasons hereinafter stated plaintiffs' motion is granted as to § 139-a and denied as to § 121; and defendants' motion to dismiss the *Gaddis* complaint insofar as it seeks to attack § 121 is granted.

The essential facts relevant to the legal issues before us are not in dispute. Each of the five plaintiffs is an indigent mother of dependent children who moved to New York from another state and within one year after establishing residence in New York applied to the Department of Social Services in the county of her newly established residence for public assistance pursuant to the AFDC program. Applying § 139-a defendants denied such assistance, the denial in the case of Annie Bell McAllister following a period of several months during which assistance payments were made to her. In the case of Luzetha Gaddis, such assistance was denied in May and June, 1969, since which time payments have been made. More detailed facts with respect to each of the five cases are set forth in the margin.

By stipulation some of the plaintiffs have received temporary emergency assistance pursuant to § 350-j, N. Y. Social Services Law, which authorizes emergency assistance to needy families for a period up to 30 days regardless of their qualifications for permanent assistance. When it appeared upon argument that such emergency assistance had expired or was about to expire and that serious and irreparable harm would be suffered by some of the named plaintiffs unless immediate assistance was forthcoming, we issued a temporary restraining order enjoining defendants, pending determination of the issues before us, from denying assistance to such plaintiffs because of failure to comply with the requirements of § 139-a.

At the outset we reaffirm that upon the facts before us the prerequisites established by Rule 23, F.R.C.P., for conduct of the actions as class suits are present. It is not disputed that numerous indigent persons have applied for and continue to apply for home relief or aid to dependent children within one year after establishing residence in New York, which brings § 139-a into play. Questions of law and defenses common to this class are presented, and the representation of the parties by the Legal Aid Society of Westchester County and the Onondaga Neighborhood Legal Services, Inc., coupled with *amicus curiae* interest on the part of the Columbia Center on Social Welfare Policy and Law, assures adequate protection of the class.

It is equally apparent that neither action has been mooted by intervening grants of assistance to certain applicants and the fulfillment of one-year's residence in New York on the part of others. There remain plaintiffs (Manning, Mickle and Bowens) against whom § 139-a will continue to be invoked for a substantial period of time unless relief is granted, and a dispute exists as to denial of aid to Mrs. Gaddis for May and June, 1969. Upon argument counsel for plaintiffs in the *Gaddis* suit further informed the Court of the existence of other applicants denied aid on the basis of § 139-a who are presumably ready to step into the shoes of any named plaintiff forced to withdraw. Dismissal for mootness would therefore not be warranted. *Kelly v. Wyman*, 294 F. Supp. 887, 890 (S.D.N.Y. 1968) (per Bryan, J.), and 294 F. Supp. 893, 908 (S.D.N.Y. 1968) (per Feinberg, C.J., three-judge court).

Turning to the merits, a dispute exists between the parties as to the manner in which § 139-a has been applied. Defendants contend that the statute is invoked to bar assistance only to those whose *sole* purpose in entering the state is to obtain public assistance, whereas plaintiffs assert that in actual practice it is used as the basis for refusing aid to a resident of less than a year even though the applicant had other purposes in mind upon entry, such as obtaining employment in the cases of plaintiffs Gaddis,

McAllister and Mackle. We find it unnecessary to resolve the issue, however; for the reason that even if § 139-a is construed as urged by defendants, the Supreme Court's recent decision in *Shapiro* v. *Thompson*, 394 U. S. 618 (April 21, 1969), dictates that it be declared unconstitutional on its face. In that case the Court held that state statutes denying public assistance to applicants who had not resided in such states for at least one year, violated the Equal Protection Clause by drawing an invidious distinction between those who resided in the state for more than a year and those who had not, which infringed upon the latter's constitutional right to travel and could not be justified either under the traditional standard of bearing a reasonable relationship to a legislative purpose, see *McGowan* v. *Maryland*, 366 U. S. 420, 425-427 (1961), or the stricter standard of promoting a "compelling state interest," see *Harper* v. *Virginia Board of Elections*, 383 U. S. 663, 668 (1966); *McLaughlin* v. *Florida*, 379 U. S. 184, 196 (1964). Prior to *Shapiro* the Court had nullified similar state laws as violative of the Commerce Clause, Art. I, § 8, and (in a concurring opinion by Justice Jackson) the Fourteenth Amendment's Privileges and Immunities Clause. *Edwards* v. *California*, 314 U. S. 160 (1941) (California statute prohibiting the bringing of a non-resident "indigent person" into the state).

Like the durational residence statutes struck down in *Shapiro*, § 139-a classifies those seeking home relief or AFDC assistance into 2 categories, those who have resided in New York for more than a year and those who have not. The former are entitled to aid upon meeting established eligibility requirements, whereas the latter, in addition to meeting such requirements, are presumed to have entered New York for the purpose of seeking assistance and must sustain the burden of proving a negative (that they did not enter for the purpose of securing assistance) by "clear and convincing proof." It is questionable whether the statutory presumption as to motive is factually support

able or bears any rational relationship to established facts. Furthermore, the burden of persuasion imposed upon the applicant is heavier than that required of most civil plaintiffs (fair preponderance of the evidence) and is one usually reserved for exceptional controversies (fraud, undue influence), more nearly approximating the standard imposed upon the Government in a criminal case (proof beyond a reasonable doubt). See McCormick on Evidence, 676, 679-681 (1954 ed.). The effect could be to work a grave injustice by rendering an arbitrary presumption almost conclusive. These features, standing alone, raise an issue as to the validity of § 139-a. Cf. *Morrison* v. *California*, 291 U. S. 82 (1934); *Kwgishian* v. *Board of Regents*, 385 U. S. 589 (1967); *Slochower* v. *Board of Higher Education*, 350 U. S. 551 (1956); *Speiser* v. *Randall*, 357 U. S. 513 (1958). However, since we believe the case to be governed by *Shapiro*, it becomes unnecessary to determine whether the statute is constitutionally vulnerable upon other grounds.

That deterrence of in-migration was the purpose behind § 139-a is disclosed by its legislative history. Although New York's Governor in 1960 vetoed an orthodox durational residency law of the type later declared unconstitutional in *Shapiro* on the ground that it was repugnant to state policy, see 1960 New York State Legislative Annual, pp. 672-73, § 139-a (popularly named the Mahoney or "Welfare Abuse" Law) was passed in 1961 as a compromise. As enacted in 1961 the law authorized New York's public welfare officials, where they had reason to believe that an applicant had come into the state for public assistance, to conduct an investigation to determine eligibility through use of various criteria, including employability and, in a case where the applicant had entered New York within six months, to determine whether the applicant had "entered the state for some purpose other than to receive public assistance and care". With the increase in New York's welfare expenditures over the next few years, con-

pled with serious fiscal crises and the frequently-expressed view that New York was becoming a "welfare haven, for "relief shoppers," see Residence Requirements for Public Relief, Colum. J. of Law & Social Problems, Vol. 2, p. 133 (1966), efforts to get a residency bill passed were renewed, coupled with pressure to limit the size of the state's welfare budget, see Governor's Budget Message, 1969-70 p. M22. The movement to quell the "spiraling rise of public assistance rolls and the expenditures therefor", Ch. 184, Laws of New York 1969, culminated in the New York Legislature's adoption on March 30, 1969 of the present stricter amended version of § 139-a, which denies home relief or AFDC assistance to the indigent in-migrant unless she can establish by clear and convincing proof that she did not enter the state for the purpose of securing such assistance. Ch. 184, § 8, Laws of New York, 1969.

Thus both the language and the legislative history of § 139-a make it abundantly clear that its objective is to deter indigents from migrating into New York for the purpose of taking advantage of higher home relief or AFDC assistance payments available here. That objective, regardless of the statutory form by which it is implemented (whether in terms of duration of residency, burden of proof as to motive, or the like) has been foreclosed by *Shapiro* as violative of the Equal Protection Clause.

> "But the purpose of inhibiting migration by needy persons into the State is constitutionally impermissible. . . . Thus, the purpose of deterring the in-migration of indigents cannot serve as justification for the classification created by the one-year waiting period, since that purpose is constitutionally impermissible." *Shapiro* v. *Thompson*, 394 U. S. 618, 629, 631 (1969).

From a constitutional standpoint § 139-a is legally indistinguishable from the statutes thus invalidated and, indeed, is similar to one of them, Conn. Gen. Stat. Rev. § 17-2d

(1965 Supp.), now § 17-2e, which, in denying assistance to those residing in Connecticut less than a year, made an exception "for those persons who come to Connecticut with a bona fide job offer or are self-supporting upon arrival in the State and for three months thereafter".

In striking down state statutes that automatically render applicants for assistance ineligible for aid during the first year of residency, regardless of their motive in establishing residence, the Supreme Court did not imply that an exception might be made permitting determent of those whose *sole* purpose in entering the state was to obtain higher benefits. On the contrary, although the Court noted that durational residency statutes "enact what in effect are non-rebuttable presumptions that every applicant for assistance in his first year of residence came to the jurdisdiction solely to obtain higher benefits," it went on to state:

> "More fundamentally, a State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally. Implicit in any such distinction is the notion that indigents who enter a State with the hope of securing higher welfare benefits are somehow less deserving than indigents who do not take this consideration into account. But we do not perceive why a mother who is seeking to make a new life for herself and children should be regarded as less deserving because she considers, among other factors, the level of a State's public assistance. Surely such a mother is no less deserving than a mother who moves into a particular State in order to take advantage of its better educational facilities." (*Ibid.*, pp. 631-632)

Thus the Supreme Court has unequivocally barred a state from discouraging entry of indigents, regardless of their motive in migrating.

No legally recognizable state interest has been offered as justifying denial of public assistance to an applicant on

the ground that she entered the state solely for the purpose of obtaining it. The argument that such a standard furthers the state's policy of encouraging self-support and self-employment must be rejected. No rational relationship exists between an applicant's motive in entering the state and her ability to obtain employment or support herself and her children. Her employability and means for self-support should be ascertainable by the same methods and standards used to determine the eligibility of long-time residents. Fraud in obtaining public assistance is punishable without regard to the applicant's motive in entering the state, N. Y. Social Services Law § 145. A classification basing eligibility upon motive, therefore, draws an invidious and irrational distinction between those who have resided in the state for more than a year and those who have not, all with a view to discouraging the latter's exercise of their constitutional right of travel.

We appreciate and sympathize with the desire of the government of New York to preserve the state's fiscal integrity and its welfare programs. It has been faced with a substantial increase in the number of recipients of public assistance in recent years. Podell, "A.F.D.C. in New York City and Other Major Urban Areas," Center for the Study of Urban Problems, City University of New York, March 1969, pp. 3-5. Aid to dependent children represents the largest segment of the state's welfare budget. Report of the Joint Legislative Committee to Revise the Social Welfare Law of New York State, 1967-68, p. 37. New York's welfare payments exceed the average for the country, N. Y. Times, April 8, 1969, p. 38, and recipients of public assistance do not expand the tax base which is the source of most of the state's welfare budget. But all of these budgetary factors, troublesome and important as they are for the people of New York, cannot validate a state's attempt to inhibit the American citizen's long-established constitutional right to travel from state to state and reside

where he pleases. As long ago as 1849 Chief Justice Taney stated:

> "[the Constitution] intended to secure the freest intercourse between the citizens of the different States. For all the great purposes for which the federal government was formed, we are one people, with one common country. We are all citizens of the United States; and as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States." *Passenger Cases*, 48 U. S. (7 How.) 283 (1849).

The failure of state attempts to fence out migrant indigents intent upon exercising their constitutional right of travel has led some to conclude that the welfare budget problem "has become the common responsibility and concern of the whole nation," *Edwards* v. *California*, *supra*, p. 175, the solution of which depends upon adoption of national welfare laws of the type recently recommended by the President, which would assure the needy, wherever located, of minimum assistance. See N. Y. Times, August 9, 1969, p. 10. In any event the solution must be found elsewhere than in the type of statute here under review.

In view of our conclusion that § 139-a is unconstitutional upon its face, it becomes unnecessary for us to decide whether it violates the Social Security Act and regulations promulgated thereunder.

In contrast to § 139-a, nothing about § 121, or the manner in which it has been applied, furnishes any ground for questioning its validity, either under the Constitution, the Social Security Act, or the regulations issued by the Department of Health, Education and Welfare. Only the *Gaddis* complaint challenges the validity of § 121 (the *Bowens* complaint limiting itself to an attack on § 139-a) and it is significant that the only ground urged by the

Gaddis plaintiffs is that § 121 is used to aid the enforcement of § 139-a by authorizing the Department of Social Services to offer to indigents declared ineligible under § 139-a free transportation back to the state whence they came. Section 121, however, does not *compel* an applicant to leave New York or return to her former state of residence, as is illustrated by the case of Mrs. Willa Jean Manning who continues to reside in New York even though she has been offered money for transportation back to Ohio. Section 121, therefore, represents nothing more than a means of assisting an indigent person who wishes voluntarily to proceed to another state where legally responsible friends or relatives are willing to furnish support. Defendants' motion to dismiss the complaint insofar as it is based upon the alleged invalidity of § 121 must be granted.

The foregoing constitutes the Court's findings of fact and conclusions of law pursuant to Rule 52(a), F.R.C.P.

Settle order on notice in accordance with Rule 65(d), F.R.C.P.

Dated: September 22, 1969.

Sterry R. Waterman,
STERRY R. WATERMAN,
U.S.D.J.

Edmund Port,
EDMUND PORT,
U.S.D.J.

Walter R. Mansfield,
WALTER R. MANSFIELD,
U.S.D.J.

FOOTNOTES

[1] Social Services Law § 139-a.

"*Special provisions to avoid abuse of assistance and care.*

"1. Any person who shall apply for home relief or aid to dependent children within one year after arrival in this state, shall be presumed to have come into the state for the purpose of receiving public assistance or care and the social services official where application is made, shall deny public assistance and care to such applicant unless such applicant shall establish by clear and convincing proof that the purpose of his or her entry was not for the purpose of securing public assistance and care in this state. In addition to complying with the foregoing provisions, the applicant shall also submit with his or her application a certificate from the appropriate local employment office of the State Department of Labor issued within a two week period from the date of his or her application stating that such employment office has no order for an opening in part-time, full-time, temporary or permanent work of any kind to which the applicant could properly be referred by such office; taking into consideration only his or her physical and mental capacity without reference to his or her customary occupation or acquired skill.

"2. The social services official shall in every case complete his investigation and make his determination of the application under this section not more than thirty days after receipt of the application."

[2] Social Services Law § 121.

"*Removal of persons to another state or country.*

"1. When any person who is cared for at the expense of the state or of any public welfare district has settlement or residence or otherwise belongs to or has legally responsible relatives able or friends willing to undertake the obligations to support him or to aid in supporting him in any other state or country, the department may furnish him with transportation to such state or country, provided, in its judgment the interest of the state and the welfare of such person will be thereby promoted.

"2. The expense of such removal shall be paid from the state treasury on the audit and warrant of the comptroller pursuant to a verified account submitted by the department."

[3] The same constitutional questions were also raised in a third suit in the Western District of New York, *Annie Bell Crimes v. George K. Wyman, et al.*, 69 Civ. 202, commenced prior to the actions before us, in which a three-judge court composed of Circuit Judge Waterman and District Judges Henderson and Burke was constituted and heard a consolidated argument for all three cases presented in Albany on September 3, 1969.

Plaintiff Loretha Gaddis came with her six children in August 1965 from Jackson, Miss. to Mamaroneck, N. Y. to care for her ill aunt. Failing to earn enough to feed, clothe and house her family she applied to the Westchester County Dept. of Social Services for AFDC assistance which was denied on May 25, 1966 pursuant to § 139 a. On July 3, 1969 she commenced the present suit and on July 9, 1969 her application for aid was approved, since which time she has received assistance.

Plaintiff Willa Jean Manning came with her two children on July 9, 1969 from Toledo, Ohio to Mount Vernon, N. Y. to escape further harm from an abusive husband. Having exhausted her meager funds on travel and necessities, she applied to the Westchester County Dept. of Social Services for AFDC assistance, which was denied under § 139 a. Emergency aid was thereafter provided pursuant to § 350 j.

Plaintiff Annie Bell McAllister came with her husband and three children in late August 1968 from Florence, S. C. to Peekskill, N. Y. where her husband, who was employed for a few months, deserted her. After working as a domestic for several months she applied on January 31, 1969 to the Dept. of Social Services for aid and received assistance. In July 1969, after she gave birth to another child, her assistance was discontinued under § 139 a pending eligibility. On July 10, 1969 emergency § 350 j assistance was granted.

Plaintiff Estil Meeks, who is expecting her [illegible] baby, came on June 14, 1969 from South Carolina to Mount Vernon, N. Y. to live with her mother and [illegible] the impending birth she could not seek employment because [illegible] in previous pregnancies and finding herself destitute and in dire need sought AFDC assistance which was denied under § 139 a.

Plaintiff Lula Bowers came with her 4 children on May 1, 1969 from Georgia to live with her brother, his wife and two children in a two bedroom apartment in Syracuse, N. Y. After Mrs. Bowers had been severely injured in Georgia [illegible] When her relatives were unable to provide the necessary assistance on May 26, 1969 she applied to the Social Services officials in Syracuse for AFDC assistance which was denied under § 139 a.

Since § 139 a is limited to applicants for home relief or aid to dependent children, it denies [illegible] applicants and those seeking other types of categorical relief available under cooperative federal-state programs administered by the State of New York, such as aid to the Aged, Blind and Disabled (42 U.S.C. §§ 1201, 1351, 1381 and 1391 et seq.) and to Veterans and Child Welfare (42 U.S.C. §§ 701, et seq.). Applicants for the latter types of assistance would be required within one year after arrival to comply with the residence imposed on applicants for home relief and AFDC.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

JOHN LASCARIS, individually and as Commissioner of the Onondaga County Department of Social Services,

Appellant,

against

OSSIE BOWENS, LUCRETIA GIBBS, WILLA JEAN MANNING, ANNIE BELL McALLISTER and RUTH MICKEL, individually and on behalf of all other persons similarly situated,

Appellees.

JURISDICTIONAL STATEMENT

LEONARD C. KOLBIN
Onondaga County Welfare Attorney
Attorney for Appellant,
Commissioner Lascaris

SPAULDING LAW PRINTING CO., SYRACUSE, N. Y.

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Questions Presented

Statement of the Case

ARGUMENT: The instant appeal presents several substantial questions of law requiring plenary consideration by this Court

The Court below was in error in interpreting this Court's decision in Shapiro v. Thompson, 394 U. S. 618 (1969) as precluding New York from considering motive in coming to the State in its allocation of public assistance resources and in its administration of its work incentive program

Conclusion

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

JOHN LASCARIS, individually and as Commissioner of the Onondaga County Department of Social Services,

Appellant,

—against—

OSSIE BOWENS, LURETHA GADDIS, WILLA JEAN MANNING, ANNIE BELL MCALLISTER and RUTH MICKLE, individually and on behalf of all other persons similarly situated,

Appellees.

JURISDICTIONAL STATEMENT

Appellant John Lascaris, Commissioner of the Onondaga County Department of Social Services, appeals from a judgment and order of the United States District Courts for the Southern and Northern Districts of New York, entered on October 14, 1969 in two consolidated cases disposed of in the same decision, enjoining any further application of Section 139-a of the New York Social Services Law on the grounds that the statute is unconstitutional and ordering that retroactive benefits be given to each member of the class which appellees seek to represent, dating back to the time of first application.

Appellant does not appeal from that portion of the decision

below, which held that Section 121 of the New York Social Services Law is in all respects constitutional.

Opinion Below

The opinion of the Northern and Southern District Courts is not yet reported and is reproduced in appellant Wyman's Jurisdictional Statement as Appendix A. The order of these District Courts is reproduced in appellant Wyman's Jurisdictional Statement as Appendix B.

Jurisdiction

The judgment and order of the United States District Courts for the Northern and Southern Districts was entered on October 14, 1969. Appellant's Notice of Appeal was filed on November 5, 1969. The jurisdiction of this Court to review the instant case is conferred by 28 U. S. C. Section 1253.

Statute Involved

Social Services Law, Section 139-a:

"Special provisions to avoid abuse of assistance and care.

1. Any person who shall apply for home relief or aid to dependent children within one year after arrival in this state, shall be presumed to have come into the state for the purpose of receiving public assistance or care and the social services official where application is made, shall deny public assistance and care to such applicant unless such applicant shall establish by clear and convincing proof that the purpose of his or her entry was not for the purpose of securing public assistance and care in this state.

In addition to complying with the foregoing provisions, the applicant shall also submit with his or her application a certificate from the appropriate local employment office of the State Department of Labor issued within a two week period from the date of his or her application stating that such employment office has no order for an opening in part-time, full-time, temporary or permanent work of any kind to which the applicant could properly be referred by such office, taking into consideration only his or her physical and mental capacity without reference to his or her customary occupation or acquired skill.

2. The social services official shall in every case complete his investigation and make his determination of the application under this section not more than thirty days after receipt of the application."

Questions Presented

1. Does this Court's ruling in Shapiro v. Thompson, 394 U.S. 618 (1969), unequivocally bar New York State from denying welfare benefits to otherwise eligible public assistance applicants whose sole motive in coming to the State was to receive such benefits?

2. Did the Court below err in ordering that retroactive benefits be paid to the entire class of public assistance recipients which appellees seek to represent, up to the time of first application for each individual, in view of this Court's rulings establishing that state statutes are presumed to be constitutional until judicially declared to be invalid?

Statement of the Case

Appellee Ossie Bowens, proceeding by order to show cause, instituted in the United States District Court for the Northern District of New York an action denominated as a class action, for a temporary restraining order and a preliminary and permanent injunction to enjoin the enforcement of §139-a of the New York State Social Services Law, which mandates denial of welfare to public assistance applicants who have come to the State for the sole motive of receiving welfare benefits. Plaintiff also sought the convening of a statutory three-judge court to hear the application. The order to show cause was dated July 25, 1969.

By order dated August 11, 1969 the Hon. Edmund Port of the United States District Court for the Northern District of New York ordered that a three-judge District Court be convened to consider appellee's claim that §139-a contravened her right to equal protection of the laws and her right to travel. The statutory three-judge court which was appointed consisted of Circuit Judge Sterry Waterman, Judge Port and Southern District Judge Walter Mansfield sitting by designation in the Northern District.

In an order dated August 11, 1969, the cases of Bowens v. Wyman, et al. and Gaddis v. Wyman, et al., another case involving the same statute were consolidated, since they had been assigned to the same three-judge panel. Appellant Lascaris answered the complaint of appellee Bowens on August 29, 1969.

The statutory three-judge court filed its opinion on September 22, 1969 finding that Section 139-a is unconstitutional upon its face. Although New York has consistently rejected residence laws in the field of public assistance as repugnant to New York State policy, the Court below came to the conclusion that the legislative history of Section 139-a

showed that its purpose was to discourage indigents from migrating into New York. It was held that this Court's decision in Shapiro v. Thompson, precluded New York from considering motive in coming into the State in its allocation of public assistance resources and its administration of New York's work incentive program. The Court did not reach the question of whether Section 139-a violates the Social Security Act (42 U. S. C. Section 601 et seq.) and the regulations promulgated thereunder, as alleged by appellees. As to Section 121 of the New York Social Services Law, the Court granted appellant's motion to dismiss the complaint insofar as it was based upon the alleged invalidity of the section.

The District Court refused on October 24, 1969, to grant a stay of the order and Justice John M. Harlan also declined on November 5, 1969, to stay the judgment below pending this appeal. In requesting such a stay the appellant had pointed out that the retroactive class order granted by the Court below made the unwarranted assumption that Section 139-a was void ab initio.

ARGUMENT

The instant appeal presents several substantial questions of law requiring plenary consideration by this Court.

The Court below was in error in interpreting this Court's decision in Shapiro v. Thompson, 394 U. S. 618 (1969) as precluding New York from considering motive in coming to the State in its allocation of public assistance resources and in its administration of its work incentive program.

A. The appellant adopts and incorporates by reference Number 1, Subdivisions A, B and C of appellant Wyman's argument.

B. The decision below held that this Court's ruling in Shapiro v. Thompson, 394 U.S. 618 (1969), unequivocally bars New York State from denying welfare benefits to otherwise eligible welfare applicants whose sole motive in coming to the State was to receive such benefits. The District Court erred when it held that even if Section 139-a of the Social Services Law of New York is construed as a sole motive statute Shapiro v. Thompson, dictates that it be declared unconstitutional on its face. It is appellant's contention that this Court never decided the question of sole motive for this Court stated in Shapiro at page 631:

> "Alternatively, appellants argue that even if it is impermissible for a State to attempt to deter the entry of all indigents, the challenged classification may be justified as a permissible state attempt to discourage those indigents who would enter the State solely to obtain larger benefits. We observe first that none of the statutes before us is tailored to serve that objective. Rather, the class of barred newcomers is all-inclusive, lumping the great majority who come to the State for other purposes with those who come for the sole purpose of collecting higher benefits...."

The District Court rejected appellant's argument that the State had a legally recognizable and a valid and compelling interest in encouraging self-support and establishing a policy which would require any parent who is physically able to rely upon employment rather than public assistance to provide the family income. The Court's order has the effect of creating a constitutional right to public assistance which must be paid to a constantly increasing class of persons whose sole motive for coming to this State is the right to receive a larger welfare check. This decision virtually eliminates the priority given by the State to its work incentive program, may cause further hardship to those already receiving public assistance and creates a fiscal crisis for local municipalities. The decision is, therefore, of extreme urgency to the State of New York and to local municipalities.

The appellant has always interpreted Section 139-a of the Social Services Law as a sole motive statute and has applied the statute to deny assistance to those who have come to the State for the sole purpose of receiving welfare benefits. Since the statute was enacted in 1961, statistics kept in Onondaga County indicate that several thousand persons have applied for welfare assistance within a relatively short period of time after their arrival in the State and that over ninety-five percent of those applying were approved and did receive public assistance. Less than five percent of those applying were denied assistance on the basis of Section 139-a, the said denial being based upon proof that the applicant came to this State for the sole purpose of receiving welfare benefits. Since May 1, 1969, the date the amended statute took effect, only sixty-four applicants have been denied assistance. It is, therefore, clear that the appellant has not merely made statements of policy, but has acted and applied the statute as a sole motive statute and has denied assistance only to those coming to this State for the sole purpose of receiving welfare benefits.

CONCLUSION

For the foregoing reasons it is respectfully requested that this Court note probable jurisdiction and grant plenary consideration to the instant appeal.

Dated: Syracuse, New York, November 19, 1969.

Respectfully submitted,

LEONARD C. KOLDIN
Onondaga County Welfare Attorney
Attorney for Appellant,
Commissioner Lascaris

SUPREME COURT OF THE UNITED STATES

October Term, 1969

WYMAN, INDIVIDUALLY AND AS COMMISSIONER OF NEW YORK DEPT. OF SOCIAL SERVICES *v.* BOWENS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT AND SOUTHERN DISTRICT OF NEW YORK

No. 866. Decided February 24, 1970*

PER CURIAM.

The motion of the appellees for leave to proceed *in forma pauperis* is granted. The motions to affirm are granted and the judgments are affirmed. *Shapiro* v. *Thompson*, 394 U. S. 618 (1969).

THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE HARLAN are of the opinion that probable jurisdiction should be noted and the cases set for oral argument.

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*Together with No. 874, *Lascaris, Individually and as Commissioner of Onondaga County Dept. of Social Services* v. *Bowens*. Appeal from the United States District Court for the Northern District of New York.